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No. 87-1448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Did the Third Circuit Court of Appeals properly apply standards controlling the grant of judgment notwithstanding the verdict and properly hold, in reversing the decision of the United States District Court for the Eastern District of Pennsylvania, that the jury had sufficient evidence before it to properly find that age was a determining factor in the discharge of the plaintiff-respondents?

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STATEMENT OF THE CASE

Procedural History

Plaintiffs brought the present action against defendant, Westinghouse Electric Corporation ["Westinghouse"], alleging that Westinghouse terminated their employment on or about December 17, 1982 in violation of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. §621 *et seq.*

The matter proceeded to a bifurcated trial before a jury which first found in favor of all plaintiffs on the issue of liability, and then in the damage phase, awarded to plaintiffs damages for past and future loss of wages. The jury also found that the violation by Westinghouse was wilful. The district court entered judgment and defendant filed timely post-trial motions requesting judgment notwithstanding the verdict or, in the alternative, a new trial, pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. Defendant also filed a Motion to Amend the Judgment.

On December 31, 1986, the court below, disregarding the verdict of the jury, entered judgment for the defendant, Westinghouse, and against all plaintiffs (A-12 through A-27). The trial court also dismissed as moot all other motions (A-28).

A timely appeal was taken by plaintiffs to the Third Circuit Court of Appeals which, on November 2, 1987, reversed the decision of the trial court and remanded plaintiff's action for consideration of motions for a new trial and to amend the judgment. The matter is now before this Court upon petition of Westinghouse Electric Corporation for the issuance of a writ of certiorari to permit review of the judgment of the United States Court of Appeals for the Third Circuit.

Statement of Facts

In summary, the five plaintiffs herein were engineers who were terminated after long service to their employer, defendant, Westinghouse, and thereafter brought the present action alleging that age was a determining factor in the defendant's action. The gravamen of their complaint was that they each were well over the age of 40 years (57 through 65); were well-experienced engineers with long service to Westinghouse (16 through 34 years); were terminated December 17, 1982 when the position of Negotiation Engineer

was eliminated during a lay-off of personnel from defendant's Concordville facility; that younger engineers were retained for performing tasks that plaintiffs had performed (and were well-qualified to perform) prior to their termination.

Each plaintiff presented independent testimony in support of his claim. Plaintiffs' theories of recovery were further supported by the statistical labor-force expert testimony of Richard Andrulis, Ph.D. who concluded that age was a determining factor in the defendant's action and that if plaintiffs had not been improperly terminated, they could have assumed job tasks of other less senior engineers.

Plaintiff, Henry Parzick, testified that he was born on September 23, 1920 and was 65 at the time of trial. Mr. Parzick stated that he was a graduate of the Worcester Polytechnic Institute and had graduated with a B.S. in Mechanical Engineering. He stated he also took graduate courses in engineering and related management subjects at UCLA. Mr. Parzick joined Westinghouse Electric Corporation on February 23, 1943 and had extensive experience in all phases of engineering including sales and technical management.

After stating his extensive background with Westinghouse Electric Corporation, Mr. Parzick proffered that he could perform and actually did perform other jobs within the general sales engineering area including those tasks specifically performed by Availability Assurance Engineers as contained in job descriptions presented by the plaintiffs. With the aid of Exhibit P-8 (a composite lay-off analysis chart prepared by the defendant, Westinghouse Electric Corporation, through its expert, Dr. Bernard Siskin), Mr. Parzick stated that he was older, had more seniority and was capable of performing job tasks of persons who remained on the payroll of Westinghouse Electric Corporation following his mandatory lay-off/retirement on December 17, 1982. Mr. Parzick further stated that he was forced to accept the pension option instead of severance because the

terms were far more favorable and was as a result of that selection not entitled to recall at Westinghouse.

Mr. Parzick finally explained that he was advised by the head of his department, Thomas Kinlin, that the personnel manager for the division, Nicholas Kulokoski, suggested defendant proceed with the elimination of the Negotiation Engineers' group despite the suggestion that Westinghouse was engaged in "something illegal" and that Mr. Kulokoski further proffered that they should give it a try "for what do we have to lose."

William J. Haessler was born on October 13, 1927 and advised the jury that he was 58 years old at the time of trial. Mr. Haessler explained that he received a Bachelor of Science in Engineering from Drexel University and first joined the defendant, Westinghouse Electric Corporation, on January 23, 1947. Mr. Haessler outlined his broad experience at Westinghouse Electric Corporation and gave a detailed account of his ability to perform various job tasks including all job duties of Availability Assurance Engineers at Westinghouse. Mr. Haessler further explained that work had been taken from him beginning in 1977 and given to a new job position established in the department — Availability Assurance Engineer. Mr. Haessler also testified that the differences in the job responsibilities for Negotiation Engineers and Availability Assurance Engineers were not significant. In summary, Mr. Haessler testified that he was older and had greater seniority than all those Availability Assurance Engineers who remained at Westinghouse after the lay-off, and that these gentlemen had in fact assumed the duties he performed prior to his lay-off on December 17, 1982.

Earle Williams was 62 years old at the time of trial and was born on August 19, 1923. He received a Bachelor of Science in Electrical Engineering at the University of New Hampshire and on July 26, 1949 started with Westinghouse Electric Corporation as an engineer. Mr. Williams set forth his work history at the

defendant corporation averring that from 1977 work previously assigned to him as a Negotiation Engineer was reassigned to persons in the Availability Assurance Engineer job family. Mr. Williams stated that he was older than all the Availability Assurance Engineers who remained at Westinghouse Electric Corporation after his discharge and that he had more seniority than each when he was laid off on December 17, 1982. Mr. Williams explained that he selected a pension option rather than severance from the company since he was advised there was no chance of recall and the economic effect of selecting the latter would have been too great. Mr. Williams testified emphatically that Availability Assurance Engineers and Negotiation Engineers did effectively the same work and that Availability Assurance Engineers and some members of management took over his work and the work of other Negotiation Engineers following the lay-off.

Plaintiff, Richard Carner, was 57 years old at the time of trial and was born on August 30, 1928. He started at Westinghouse on July 2, 1951 and had extensive work history and experience with the company including jobs that required the extensive use of technology. He stated without reservation that he had the ability to perform the work of Availability Assurance Engineers at the time he was discharged on December 17, 1982 and that he was older and had greater seniority than all of the Availability Assurance Engineers that remained.

Lal R. Bhaya was 61 years old at the time of trial and was born on October 10, 1924. Mr. Bhaya received his Bachelor of Science in Electrical Engineering at the University of Bombay in 1947 and started with the defendant on December 1, 1966. Mr. Bhaya proffered that he was fully capable of doing work of Applications Engineers at the time he left and that in fact Applications Engineers and some management personnel took over his work. He also stated that he was older than all

the Applications Engineers and persons in management who took over his work and that in fact he had previously done the work of Applications Engineers.

Plaintiffs' position was further presented through the testimony of Dr. Richard Andrulis, a qualified expert in the trial analysis of statistics in the workplace. After acceptance by the court of his qualifications as an expert, Dr. Andrulis testified that age was a determining factor in the elimination of the job family of Negotiation Engineers basing that opinion on a family-by-family analysis of all positions affected by the lay-off. Dr. Andrulis further proffered that his examination of the job descriptions of Availability Assurance Engineers and Negotiation Engineers demonstrated that the responsibilities and requirements for each were very similar. Dr. Andrulis also suggested that the method which could have been used to effect the lay-off without any age bias was to retain those persons in the job families of Availability Assurance Engineer or Applications Engineer or Negotiation Engineer who had the highest seniority. Importantly, he stated there was direct financial benefit to Westinghouse to discharge older workers rather than younger ones and testified from his analysis of seniority that plaintiffs would have remained in the employ of Westinghouse had their job family not been eliminated.

Dr. Andrulis' family-by-family analysis was supported through the testimony and exhibits of Dr. Bernard Siskin, defendant's statistical expert. Dr. Siskin pointed out that the average age of Availability Assurance Engineers at the end of 1962 was 35.8 and that they had been terminated as a family at the rate of 29.4%. Conversely, the average age of Negotiation Engineers at the end of 1982 was 48.9 and that they were terminated at the rate of 93.3%. This disparity was further highlighted by inspection of the average age of engineers generally of 41.8 years and their termination rate of 41%. Dr. Siskin stated that on December 17,

1982 there were 17 Availability Assurance Engineers and that only five were terminated, while there were 15 Negotiation Engineers and 14 were terminated.

The attempts by the defendant to counter the extensive and convincing evidence presented by the plaintiff was adjudged by the jury to be ineffective and incredible.

In an attempt to counter the damaging testimony of Henry Parzick, Thomas Kinlin, plaintiffs' supervisor at the time of their termination, testified that he did not recall attending any executive meetings with Mr. Kulokoski where lay-offs were discussed. His statements in that regard were countered by his further testimony that the occurrence of such a meeting and the statements proffered by plaintiff, Henry Parzick, were "not impossible", and that he did "believe Hank" and "don't think he's lying."

Chester Turnbull, a Manager of Labor Relations for defendant, also supported plaintiffs' position. While he asserted that the five plaintiffs could not cross job progressions to "bump" any of the remaining younger engineers, he clearly admitted that duties could be transferred from one group of engineers to another without a violation of the controlling contract.

James Borden, Manager of the Availability Assurance Department with responsibility for both Availability Assurance and Negotiation Engineers during the time plaintiffs were laid off, supplied the most revealing (and most damaging to the defendant) testimony relating to the lay-off process at defendant's facility. He advised that during 1982 he was involved in the complicated process of planning, preparing and effecting lay-offs, made a decision that Negotiation Engineers were not necessary to the continued operation of the department, and implemented a complex severance program. Yet he did not provide any documentation of his decisions or proffer any proof of declining sales or the lack of ability

or accomplishment of the individual plaintiffs. Mr. Borden, like Mr. Turnbull, could not specify any contractual restriction prohibiting the retention of plaintiffs by allowing an interchange of job tasks.

ARGUMENT

The present request for the issuance of a Writ of Certiorari is dependent upon a showing by petitioner that the United States Court of Appeals for the Third Circuit improperly applied standards governing review of the granting of judgment notwithstanding the verdict of the jury and the sufficiency of evidence presented by plaintiffs in the court below. Even the most cursory reading of Judge Mansmann's well-reasoned opinion reveals that the Court of Appeals for the Third Circuit properly reversed the district court which had failed to benefit plaintiffs with the resolution of all factual issues in their favor.

I. THE COURT OF APPEALS APPLIED UNIVERSALLY ACCEPTED PRINCIPLES OF LAW GOVERNING ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

In this context, petitioner suggests that this Court must review and reverse the decision below because the Court of Appeals erred in the application of legal standards espoused by this Court and various courts of appeal relating to actions under the Age Discrimination in Employment Act. More specifically, petitioner complains the Court of Appeals erred by a misapplication of evidentiary standards in the context of this specific age discrimination case. It is suggested that these contentions are unsupported in the record and do not support a review by this Court. To the contrary, under universally settled principles, it is quite apparent that the Court of Appeals for the Third Circuit properly held that the plaintiffs affirmatively carried their ultimate burden in

establishing that age was a determining factor in the decision to eliminate the position of Negotiation Engineer.

Under the guidelines of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff can only recover under the ADEA if he or she presents proof by a preponderance of the evidence that age was a determining factor in the employer's decision. See also *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980) and *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied 469 U.S. 892 (1984).

This standard permits a plaintiff to initially establish a *prima facie* case of unlawful discrimination by demonstrating that plaintiff was a member of the protected class and that he/she was laid off from his/her job for which he/she was qualified, while others outside the protected class and/or younger than plaintiff were more favorably treated. See *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983), as cited in *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986).

Once the plaintiff has established a *prima facie* case of age discrimination, the burden then shifts to the defendant to dispel the adverse inference of age discrimination by articulating a legitimate non-discriminatory reason for the lay-off. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Massarsky v. General Motors Corp., supra; Smithers v. Bailar, supra.* After the defendant has satisfied that requirement, the ultimate burden is said to remain with the plaintiff to prove that the defendant intentionally discriminated against the plaintiffs. The necessary showing of pretext, can be demonstrated by either *directly* persuading the court that a discriminatory reason was the more likely motivation or by *indirectly* showing that the explanation proffered by the employer was unworthy of credence. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of*

Community Affairs v. Burdine, supra; Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir.), cert. denied 469 U.S. 1087 (1984).

In the present case, it is apparent that the Court of Appeals properly held that the plaintiffs produced sufficient evidence to sustain the ultimate burden in accordance with the afore-cited authority. They did so by *affirmative evidence* and the *lack of credibility of defendant's position* that age was in fact a determining factor in their lay-off.

First, the "legitimate, non-discriminatory reasons" set forth by James Borden, Manager of plaintiffs' department at time of termination, were totally unsupported by any documentary or objective evidence. Mr. Borden stated throughout his testimony that no writings were available to support the position taken by the company that Negotiation Engineers were in fact the most expendable, and that no objective criteria was used in making this decision. It was, according to Mr. Borden, felt to be the best method to weather the storm and best prepare the company for the future when it was hoped that the business climate would change sometime at or near the turn of the century.

Contrary to this unsupported position, each plaintiff testified extensively as to the interchangeability of job tasks and the fact that he was fully qualified to remain as an employee at Westinghouse and accept job tasks from other less senior employees who were not within the protected class. No credible evidence was adduced by defendant which would have supported the averment that the transfer of job tasks was precluded by collective bargaining. In fact, both Messrs. Borden and Chester A. Turnbull, Manager of Labor Relations and Manager of the Wage and Salary Administration at the defendant company, were unable to specify any contractual requirement disallowing the interchangeability of job tasks where those tasks fit within the job description of

the individual. It should be noted in this regard that the exhibits submitted by plaintiffs relating to the job descriptions of Negotiation Engineers, Availability Assurance Engineers and Applications Engineers clearly demonstrated a similarity of tasks which would have permitted interchangeability without union bargaining. In affirmative support of their position, plaintiffs submitted the testimony of Dr. Andrulis who stated that the job descriptions of both Negotiation Engineers and Availability Assurance Engineers demonstrated a very similar status in job responsibility and requirements.

The credibility of the defendant was also placed in question by the ease of which satisfaction of the requirements of the ADEA could have been met. Dr. Andrulis testified (as supported by the documentation presented in P-8) that a strict seniority basis in each job family (without the elimination of an entire job family) would have provided Westinghouse with an ample work force capable of carrying out all tasks which were being performed on the day the plaintiffs were terminated. Dr. Andrulis fueled further question of defendant's real motives through his testimony that there was substantial financial benefit to Westinghouse to discharge older workers rather than younger ones.

Most importantly, the issue of pretext in the elimination of the job family of Negotiation Engineers was answered directly by Dr. Andrulis who proffered that the actions of Westinghouse were clearly revealed to be discriminatory when one viewed the impact on older workers on a job family-to-job family basis. Dr. Andrulis' analysis in this regard is supported by the statistical information presented in P-8 as analyzed by Dr. Siskin who agreed that the class of engineers most dramatically affected by the lay-off, Negotiation Engineers (they were terminated at a 93.3% rate as opposed to a 29.4% rate for Availability Assurance Engineers) were substantially

older than other retained job families (48.9 years compared to 35.8 years for the average age of Availability Assurance Engineers).

Lastly, the testimony of Mr. Parzick revealed that high level managers at Westinghouse were aware that the plan to eliminate the job family of Negotiation Engineer might be "illegal" (discriminatory) but decided to take a chance in that regard.

Adherence to a mechanistic evaluation of plaintiffs' evidence in an action under the ADEA has been universally rejected.

> The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' *Burdine, supra,* at 253, 101 S. Ct., at 1093. In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin." ' *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 51 L. Ed. 2d 957 (1978), quoting *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S. Ct. 1843, 1854, n. 15, 52 L. Ed. 2d 396 (1977). The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of the common experience as it bears on the critical question of discrimination.' *Furnco, supra,* 438 U.S., at 577, 98 S. Ct. at 2949. *Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.' Burdine, supra,* 450 U.S., at 253, 101 S. Ct., at 1093. *United States Postal Service Board of*

> *Governors v. Aikens*, 460 U.S. at 715 (1983), (Emphasis added).

Certainly, this reasoning in *Aikens* has been adopted as to age claims in the Third Circuit.

> *Thus, once the district court denied Kaiser's motion for directed verdict and ordered that the case proceed, the focus of inquiry shifted to deciding the ultimate discrimination issue. Accordingly, we find it unnecessary at this point in time to decide whether or not a prima facie case had, in fact, been established by the plaintiff.* Rather, we must review whether or not the plaintiff sustained his *ultimate* burden of proving discrimination, or in other words, that his age was a determinative factor in Kaiser's decision to terminate him. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra*, 789 F.2d at 257. (Emphasis added).

See also *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132 (7th Cir. 1985) and *Duffy v. Wheeling Pittsburgh Steel Corp., supra.*

It is apparent, therefore, that the U. S. Court of Appeals for the Third Circuit correctly held that allowing to the plaintiffs the advantage of every fair and reasonable inference from the evidence presented and exposing the evidence presented and exposing the evidence to the strongest light favorable to the party against whom the Motion is made (i.e., plaintiffs), as a matter of law the record is not critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief. See *Hanslovan v. Pennsylvania Mines Corp.*, 603 F. Supp. 464 (W.D. Pa. 1985), aff'd. 791 F.2d 917, 791 F.2d 918 (3d Cir. 1986), citing *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 215 (3d Cir. 1983).

II. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT ERRED IN USURPING THE FUNCTION OF THE JURY.

A Rule 50(b) motion for judgment notwithstanding the verdict of the jury requires a district court judge to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Zegan v. Central R.R. Co. of NJ*, 266 F.2d 101 (3d Cir. 1959). Under such circumstances, the motion may be granted only if, as a matter of law, the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief. *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 101 (3d Cir. 1977).

> These motions require a judge to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must then be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding. *Massarsky v. General Motors Corp.*, 706 F.2d at 119.

See also *Fireman's Fund Insurance Co. v. Vidafreeze Corp.*, 540 F. 2d 1171 (3d Cir.), cert. denied 429 U.S. 1053 (1977).

When considering a motion for judgment notwithstanding the verdict, the trial court must review the evidence in the light most favorable to the party against whom the motion is made and give the respondent the advantage of every fair and reasonable inference. See *Danny Kresky Enterprises Corp. v. Magid, supra*, and *Inventive Music, Ltd. v. Cohen*, 617 F.2d 29 (3d Cir. 1980). See also *Ripee v. Grand Valley Mfg Co.*, 762 F.2d 25 (3d Cir. 1985).

The standard by which the Court of Appeals must examine a grant or denial of a motion for judgment notwithstanding the verdict is identical to that which is required to be employed by the trial court as set forth above. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Danny Kresky Enterprises Corp. v. Magid, supra; Fireman's Fund Insurance Co. v. Vida-freeze Corp., supra.* See also *Boutros v. Riggs Nat'l. Bank, D.C.*, 655 F.2d 1257 (D.C. Cir. 1981) and *H. C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104 (5th Cir. 1980).

These standards were not, as suggested by petitioner Westinghouse, altered by this Court's holding in *Anderson v. Liberty Lobby, Inc.*, ____*U.S.* ____, 106 S. Ct. 2505 (1986). That decision restated the requirement that a plaintiff, when presented with a motion for summary judgment, is required to present affirmative evidence in support of allegations in the Complaint. Inapposite to the factual basis of that decision, plaintiffs herein clearly presented affirmative evidence of age discrimination from which a jury could find that age was a determining factor in their discharge.

In overturning the trial court's granting of defendant's motion for judgment notwithstanding the verdict, the Court of Appeals adhered to the clear requirement contained in the litany of cases cited above that the resolution of all factual conflicts is a jury function. The trial court, in summary, had improperly set aside the verdict based upon its analysis that plaintiffs' burden had not been met in three crucial areas:

> (1) plaintiffs did not prove that they could have remained and accepted responsibility for the transfer of tasks from terminated engineers in other categories;
>
> (2) plaintiffs did not demonstrate that the testimony of James Borden was unworthy of credence; and

(3) plaintiffs' expert witness drew "utterly ridiculous" statistical comparisons about age discrimination that precluded the jury from relying on his testimony and rendering its verdict.

A. It Was Reasonable for the Jury to Infer That Plaintiffs Could Have Assumed Transfer of Job Duties.

The trial court improperly characterized plaintiffs' proffered evidence that their duties were similar to those performed by Availability Assurance and Applications Engineers and that therefore, they could have accepted transfer of job duties instead of being terminated, as "hopelessly vague and contradictory." The trial court, while conceding that the jury could have reasonably inferred from the evidence that "there was some degree of similarity, and perhaps some overlap in job duties", nevertheless and as stated by the Third Circuit Court of Appeals inexplicably opined that a jury's inference of the possibility of task interchange from such evidence "would be pure speculation."

Such second guessing for the purpose of deciding a motion for judgment notwithstanding the verdict is an impermissible invasion of the jury's province. As this Court originally observed in *Schulz v. Pennsylvania R.R. Co.*:

> The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn. [Footnotes omitted]. *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956).

See also *Fireman's Fund Ins. Co. v. Vidafreeze Corp.*,

supra, at 1178 ("It is the function of the trier of fact alone, the jury in this instance, to evaluate contradictory evidence and to draw inferences therefrom"); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 928 (D.C. Cir. 1982) ("The issue of discrimination was for the jury, not the judge, and the absence of direct evidence of this specific kind is not determinative. A reasonable jury could apply common sense and general experience to the hard facts it found").

Since each of the plaintiffs and Dr. Andrulis testified that the union contract and the circumstances present at their termination permitted the transfer of job duties to them, a finding that plaintiffs could have been given duties from job progressions not slated for elimination was clearly "an inferential leap that the jury was permitted to make in light of the evidence before it." *Danny Kresky Enterprises Corp., supra*, 716 F.2d at 212.

In *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra*, the plaintiff alleged that the employer had engaged in discrimination by, *inter alia*, "not follow[ing] its policy of attempting to place terminated, salaried employees in other employment or to retire when possible." In that case, although the employer presented evidence at trial that established that the plaintiff was at least qualified at the time the required reduction in force took place, the Court of Appeals refused to permit interference with the jury's finding that age was a determinative factor in the plaintiffs' discharge and held that it was a reasonable inference. Similarly, in this case, the defendant presented no expert or documentary evidence to directly counter plaintiffs' assertion that job tasks could be interchanged, but relied instead on assertions made by Messrs. Turnbull and Borden that the transfer of job function was not possible under the prevailing Collective Bargaining Agreement and that the jobs were so dissimilar so as not to allow interchangeability of job tasks. As discussed above, neither of

defendant's witnesses could point to any specific clause or language in the applicable contracts controlling their opinion and neither had any documentation of his opinion regarding the dissimilarity of job duties. It is clear, therefore, that the jury could accept the affirmative statements of plaintiffs and their expert and completely reject the contrary assertions of the defendant. Certainly, plaintiffs' assertions clearly formed permissible fodder for a jury's inference of age discrimination. See *Freeman v. Franzen*, 695 F.2d 485, 489 (7th Cir. 1982).

B. The District Court Impermissibly Determined That Plaintiffs Had Not Sufficiently Demonstrated Pretext.

In justifying its action, the trial court below concluded that plaintiffs had not eliminated defendant's proffered justification for eliminating plaintiffs' jobs and therefore, had not demonstrated pretext. It further held that plaintiffs' contentions that Mr. Borden's testimony lacked credibility were "specious" and constituted "rank speculation". The Third Circuit Court of Appeals correctly stated that this adjudication by the trial court violated the most basic tenets of the separation of function of court and jury.

It is axiomatic that "in considering a motion for judgment notwithstanding the verdict, [a Court is] not free to weigh the evidence, *pass on the credibility of the witness*, or substitute [its] judgment of the facts for that of the jury." *Blair v. Manhattan Life Ins. Co.*, 692 F.2d 296, 300 (3d Cir. 1983) [emphasis added]. "The trial court may not assess the credibility of the witnesses or weigh the evidence." *Metrocare v. Washington Metropolitan Area Transit Authority, supra*, 679 F.2d at 925; *Freeman v. Franzen, supra*, 695 F.2d at 488. The same holds true in an appellate court's consideration of the disposition of a Motion: "[a]t least two factors are outside the parameters of either court's view — the *credibility of*

the evidence and the weight of it." *Fireman's Fund Insurance Co. v. Vidafreeze, supra,* 540 F.2d at 1179 [emphasis added]. These admonitions are particularly apt in the present case since Mr. Borden's credibility hinged entirely on his oral testimony without any documentation or other support.

In a highly analogous factual circumstance, the Court of Appeals for the District of Columbia held that an employer's attempt to rebut a charge of racial discrimination by proffering various testimony of past or current employees, officers and owners of the company, constituted insufficient grounds to support a motion for judgment notwithstanding the verdict. *Carter v. Duncan-Higgins, Ltd.,* 727 F.2d 1225 (D.C. Cir. 1984). After noting that the weighing of conflicting evidence and the evaluation of witness credibility is exclusively within the jury's province, the court explained its reasoning:

> For the most part, the only evidence of [the Employer's] intent was oral testimony: the explanations were without support of extensive evidence. For example, there was no internal memorandum [supporting employer's position].
>
> The weight to be given to these offered business justifications thus required an evaluation of witness credibility. And, an evaluation of witness credibility is the exclusive function of the jury. *Indeed, where the only evidence of intent is oral testimony, a jury could always choose to discredit the proffered explanation . . . .*
>
> Because the strength of the purported business reason — and indeed the strength of the Company's case — was thus inextricably inter-related to questions of witness credibility, the case had to go to the jury. *Carter v. Duncan-Higgins, Ltd., supra,* 727 F.2d at 1234 [emphasis added].

Similarly, in the present matter, defendant presented no documentary evidence to support its statement that the Negotiation Engineer position could be profitably eliminated. Although the trial court in the present case scoffed at any claim that such an omission could weaken the credibility of Mr. Borden, it is clear that the court in *Carter v. Duncan-Higgins, Ltd., supra*, found a similar lack of documentation *highly* illuminating on the issue of employer credibility.

Finally, the district court chastised plaintiffs' counsel for calling into question the credibility of Mr. Borden because of a statement he made on cross-examination, characterizing the actions of plaintiffs' counsel as "rank speculation". Under parallel circumstances, the Court of Appeals for the Eleventh Circuit in *Lindsey v. American Cast Iron Pipe Company*, 772 F.2d 799 (11th Cir. 1985) reversed a judgment notwithstanding the verdict granted to defendant in an age discrimination case noting that "in order to refute successfully the defendant's articulated reason for non-selection, a plaintiff may rely solely on his initial evidence combined with evidence elicited from the defendant on cross-examination." *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d at 802, n. 1. In such situations, that court observed that the case was basically a "credibility contest", thus making it inappropriate to disturb the jury's verdict. *Id.* Accordingly, it was clearly appropriate for plaintiffs' counsel to draw the jury's attention to a remark made by Borden under cross-examination and it was equally proper for the jury to employ the remark in gauging Borden's credibility.

C. The District Court Impermissibly Weighed the Credibility of Plaintiffs' Expert Witness.

In setting aside the jury verdict, the trial court below impermissibly relied on its observation that the comparisons made by plaintiffs' expert and the conclusions he

drew from them were "so obviously non-sensical" and "utterly ridiculous", that any reliance upon them by the jury was impermissible. Such action completely contravenes the jury's function to weigh the evidence and assesses credibility and is, in the context of considering a motion for judgment notwithstanding the verdict, a clear abuse of discretion. See *Blair v. Manhattan Life Ins. Co., supra; Fireman's Fund Insurance Co. v. Vidafreeze, supra; Metrocare v. Washington Metropolitan Area Transit Authority, supra;* and *Freeman v. Franzen, supra.* See also *Lust v. Clark Equipment Co., Inc.,* 792 F.2d 436 (4th Cir. 1986) where the Court of Appeals for the Fourth Circuit reversed a judgment notwithstanding the verdict entered in favor of the defendant in a tort action, noting as follows:

> "To set aside the verdict of the jury, a court would have either to disbelieve Lust's expert or to attach little weight to his testimony. But granting judgment notwithstanding the verdict on these grounds would violate the principles [of deference to the jury's determination of weight of evidence]. We agree with the Fifth Circuit that '[i]t was for the jury to decide which of the experts was more credible, which used the most reliable data, and whose opinion — if any — the jury would accept." *Lust v. Clark Equipment Co.,* 792 F.2d, at 439, quoting *Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc.,* 695 F.2d 883 (5th Cir. 1983).

Similarly, in *Borras v. Sea-land Service, Inc.,* 586 F.2d 881, 884 (1st Cir. 1978), a judgment entered notwithstanding the verdict was overturned on the ground that the district court, in granting the motion, had impermissibly ruled that the plaintiff's expert opinion was "based upon nothing more than mere suspicion and conjecture, and [was] entirely too speculative to support the verdict." In that case, the Court of Appeals noted that the expert's professional credentials were adequate for him to be

allowed to testify and that in fact he had been permitted to testify as an expert. The court therefore concluded that his opinion became part of the corpus of the evidence before the jury and that the judge could not substitute his own views of credibility for the finder of fact.

Similarly, in the instant case, Dr. Andrulis' professional credentials were not challenged, and he was allowed to testify. Thus, despite the lower court's response to this expert's conclusions, his testimony formed an important part of the corpus of the evidence before the jury which then became the sole arbiter of the validity and worth of that evidence.

CONCLUSION

In sum, the Court of Appeals properly ruled that "the trial judge in the instant case invaded forbidden territory . . . in his review of the evidence although he articulated an understanding of the constraints of his review." *Fireman's Fund Insurance Co. v. Vidafreeze, supra*, 540 F.2d at 1178. The attack upon plaintiffs' inability to meet their ultimate burden was improper in the context of deciding a motion for judgment notwithstanding the verdict and was appropriately not permitted by the Court of Appeals for the Third Circuit. No issue of law has been raised by petitioner herein to permit a review of the decision of the Court of Appeals beyond a re-analysis of the facts as concluded by the jury. Plaintiffs therefore respectfully request the denial of the Petition for the issuance of the Writ of Certiorari, thereby permitting this matter to be remanded to the district court to proceed in accordance with the instructions of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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